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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted five recommendations at its Seventieth Plenary Session. The appended recommendations address Recusal Rules for Administrative Adjudicators, Public Availability of Adjudication Rules, Improving Access to Regulations.gov's Rulemaking Dockets,) Public Engagement in Rulemaking, and Public-Private Partnerships.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2018-4, Gavin Young; for Recommendation 2018-5, Todd Phillips; for Recommendations 2018-6 and 2018-8, Todd Rubin; and for Recommendation 2018-7, Frank Massaro. For each of these actions the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Seventieth Plenary Session, held December 13-14, 2018, the Assembly of the Conference adopted five recommendations.

Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators.* This recommendation urges agencies to issue procedural rules governing the recusal of adjudicators to ensure both impartiality and the appearance of impartiality in agency adjudications. It encourages agencies to adopt procedures by which parties can seek recusal of adjudicators assigned to their cases and to provide written explanations for recusal decisions.

Recommendation 2018-5, *Public Availability of Adjudication Rules.* This recommendation offers best practices to optimize agencies' online presentations of procedural rules governing adjudications. It encourages agencies to make procedural rules for adjudications and related guidance documents available on their websites and to organize those materials in a way that allows both parties appearing before the agencies and members of the public to easily access the documents and understand their legal significance.

Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets* (formerly titled *Regulations.gov and the Federal Docket Management System*). This recommendation offers suggested improvements to Regulations.gov, the website that allows the public to comment on many federal agencies' rulemaking proposals. It provides recommendations to the governing body of Regulations.gov, called the eRulemaking Program, and to agencies that participate in Regulations.gov for ensuring that rulemaking materials on Regulations.gov are easily searchable and categorized consistently and clearly. These recommendations include using one electronic docket per rulemaking, promoting interoperability among key websites (e.g., Federalregister.gov and Reginfo.gov), and making rulemaking materials available to search engines.

Recommendation 2018-7, *Public Engagement in Rulemaking.* This recommendation offers strategies for agencies to enhance public engagement prior to and during informal

rulemaking. It encourages agencies to invest resources in a way that maximizes the probability that rule-writers obtain high quality public information as early in the process as possible. It recommends expanding the use of requests for information and advance notices of proposed rulemaking, targeting outreach to individuals who might otherwise be unlikely to participate, and taking advantage of in-person engagement opportunities to solicit stakeholder input and support future informed participation.

Recommendation 2018-8, *Public-Private Partnerships.* This recommendation offers agencies guidance on legal and practical considerations for participating in public-private partnerships. It commends to agencies a *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level*, which provides guidance on the key legal questions agencies encounter in the operation of public-private partnerships, and proposes mechanisms that would allow agencies to share resources and best practices with one another when creating and administering such partnerships.

The Appendix below sets forth the full texts of these five recommendations. In addition, there are two timely filed Separate Statements associated with Recommendations 2018-4 and 2018-6 (authorized under 5 U.S.C. 595(a)(1)). The Conference will transmit the recommendations to affected agencies, Congress, and the Judicial Conference of the United States, as appropriate. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at: https://www.acus.gov/meetings-and-events/plenary-meeting/70th-plenary-session.

Dated: February 1, 2019

Shawne C. McGibbon,

General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2018-4

Recusal Rules for Administrative Adjudicators

Adopted December 13, 2018

Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of adjudication. Recusal serves two important purposes. First, it helps ensure that parties to an adjudicative proceeding have their claims resolved by an impartial decisionmaker. This aspect of recusal is reflected in the Due Process Clause, as well as statutory, regulatory, and other sources of recusal standards. Second, the recusal of adjudicators who may appear partial helps inspire public confidence in adjudication in ways that a narrow focus on actual bias against the parties themselves cannot.[1] Appearance-based recusal standards are in general not constitutionally required, but have been codified in judicial recusal statutes as well as model codes.[2] Unlike with federal judicial recusal, there is no uniformity regarding how agencies approach appearance-based recusal in the context of administrative adjudication.

In Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the

[1] Louis J. Virelli, III, Recusal Rules for Administrative Adjudicators (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators.

[2] *See* 28 U.S.C. § 455(a) (2012); MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 3(C) (AM. BAR ASS'N 1989), *available at* http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj. Both require recusal by federal adjudicators when their "impartiality might reasonably be questioned."

case of actual bias.[3] This Recommendation builds upon Recommendation 2016-4 by addressing the need for agency-specific recusal rules that consider the full range of actual and apparent bias. It focuses on a variety of agency adjudications, including those governed by the adjudication provisions of the Administrative Procedure Act (APA), as well as adjudications not governed by the APA but nonetheless consisting of evidentiary hearings required by statute, regulation, or executive order.[4] It also covers appeals from those adjudications. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when determining rules for the recusal of agency heads.

Recusal rules addressing actual and apparent bias can protect parties and promote public confidence in agency adjudication without compromising the agency's ability to fulfill its mission effectively and efficiently. This necessarily lends itself to standards that are designed in accord with the specific needs and structure of each agency and that allow for fact-specific determinations regarding the appearance of adjudicator impartiality. This contextualized nature of administrative recusal standards is reflected in the list of relevant factors in Paragraph 3 for agencies to consider in fashioning their own recusal rules. The parenthetical explanations

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[3] Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

[4] In the context of Recommendation 2016-4 and the associated consultant report, adjudications with evidentiary hearings governed by the APA adjudication sections (5 U.S.C. §§ 554, 556, and 557) and adjudications that are not so governed but that otherwise involve a legally required hearing have been named, respectively, "Type A" and "Type B" adjudications. This Recommendation addresses both Type A and Type B adjudications but does not apply to adjudications that do not involve a legally required evidentiary hearing (known as "Type C" adjudications). *See* Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016); Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 2 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report.

accompanying these factors show how different features of an agency's administrative scheme may affect the stringency of those rules.

Recusal rules also provide a process for parties to petition their adjudicator to recuse in the event he or she does not elect to do so sua sponte. This right of petition promotes more informed and accountable recusal decisions. Recusal rules can further provide for appeal of those decisions within the agency. Such appeals are typically conducted by other agency adjudicators acting in an appellate capacity but may also include the official responsible for the adjudicator's work assignments. This right of appeal increases the reliability and accuracy of recusal determinations and helps ensure the consistency and effectiveness of the work assignment process. Consistent with the APA, adjudicators, including appellate reviewers, must provide parties with a written explanation of their recusal decisions.[5] Finally, agencies could provide for the publication of recusal decisions. Both written explanations and publication of recusal decisions increase transparency and thus the appearance of impartiality.

It is important to distinguish adjudicative recusal rules and procedures from the ethics rules promulgated by the Office of Government Ethics (OGE).[6] As an initial matter, the two are not mutually exclusive. Even where ethical and recusal rules overlap, it is entirely possible and coherent to enforce both. This is due, at least in part, to the differences in scope, form, and enforcement mechanisms between the two. Ethics rules prohibit employees from participating in certain matters when they have a conflict of interest or an appearance of a conflict. Adjudicative recusal rules focus on how an agency, acting through its adjudicators and appeal authorities,

[5] 5 U.S.C. § 555(e) (2012).

[6] The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 5 U.S.C. App.) established the Office of Government Ethics to provide "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." OGE's *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 C.F.R. Part 2635.

decides who will hear certain cases in a manner that ensures the integrity and perceived integrity of adjudicative proceedings. Adjudicative recusal rules are thus broader in focus and narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as agency employees need to have clear guidance as to what they may or may not do. Adjudicative recusal rules, by contrast, tend to be much more open-ended and standard-like. They are focused on maintaining both actual impartiality and the appearance of impartiality of adjudicative proceedings, which may be compromised by conduct that would not constitute a breach of any ethics rule, such as advocating a particular policy in a speech before a professional association.

The enforcement mechanism is also different. If an adjudicator, like other employees, participates in a matter in violation of an ethics rule, the adjudicator can be subject to discipline. In contrast, if an adjudicator decides not to recuse him or herself in a case where he or she should have been recused, even if the adjudicator would not be subject to discipline, the decision not to recuse could be appealed under whatever process the agency has established. In addition, the recusal process can be initiated by a party to the adjudication if an adjudicator does not recuse him or herself sua sponte.

Under current law, an agency that wishes to supplement its ethics rules must, of course, do so through the OGE supplemental process.[7] Under that process, agencies, with the concurrence of OGE, may promulgate ethics rules that supplement existing OGE rules. This Recommendation, in contrast, focuses exclusively on a set of recusal rules an agency may wish to adopt to preserve the integrity and perceived integrity of its adjudicative proceedings.

Recommendation

1. Agencies should adopt rules for recusal of adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA), as

[7] *See* Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR 2635.105.

well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive order. The recusal rules should also apply to adjudicators who conduct internal agency appellate review of decisions from those hearings, but not to agency heads. When adopting such rules, agencies should consider the actual and perceived integrity of agency adjudications and the effectiveness and efficiency of adjudicative proceedings.

2. Agency rules should, consistent with ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*,[8] provide for the recusal of adjudicators in cases of actual adjudicator partiality, referred to as bias in ACUS Recommendation 2016-4, including:
    a. Improper financial or other personal interest in the decision;
    b. Personal animus against a party or group to which that party belongs; or
    c. Prejudgment of the adjudicative facts at issue in the proceeding.
3. Agency recusal rules should preserve the appearance of impartiality among its adjudicators. Such rules should be tailored to accommodate the specific features of an agency's adjudicative proceedings and its institutional needs, including consideration of the following factors:
    a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in ensuring that its adjudicators appear impartial);

[8] 81 Fed. Reg. 94,314 (Dec. 23, 2016).

b. Whether the hearing is part of enforcement proceedings (an agency's interest in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger appearance-based recusal standards);

c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators readily available to replace a recused adjudicator (if recusal could realistically infringe upon an agency's ability to adjudicate by depriving it of necessary adjudicators, then more flexible appearance-based recusal standards may be necessary);

d. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible appearance-based recusal standards); and

e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict appearance-based recusal standards, but the greater authority of the reviewer could warrant stronger appearance-based recusal standards).

4. Agency rules should include provisions identifying considerations that do not, on their own, warrant recusal and specifying situations in which recusal is not required or is presumptively not required.

5. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include

the right of petition for parties seeking recusal, initial determination by the presiding adjudicator, and internal agency appeal.

6. In response to a recusal petition, adjudicators and appellate reviewers of recusal decisions must provide written explanations of their recusal decisions. In addition, agencies should publish their recusal decisions to the extent practicable and consistent with appropriate safeguards to protect relevant privacy interests implicated by the disclosure of information related to adjudications and adjudicative personnel.
7. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads.

Separate Statement on Administrative Conference Recommendation 2018-4 by Public Member Richard D. Klingler[1]

Filed January 4, 2019

This statement briefly summarizes the reasons for my vote against adopting Administrative Conference Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators* (Dec. 13, 2018). I appreciate the fine and careful work by committee members and others leading to this Recommendation, and in particular Prof. Virelli's thorough and helpful report to the Conference. However, I believe the Recommendation is in considerable tension with basic separation of powers principles and will lead to associated distortions in Executive Branch decisionmaking and accountability. To avoid these results, agencies might (a) carefully consider whether any recusal rules should apply at all to more senior agency officials, including those reviewing initial adjudicatory decisions and (b) clarify that their recusal rules do not apply

[1] Partner, Sidley Austin LLP. This statement is made solely in my capacity as an ACUS Public Member.

to statements or positions regarding policy or the interpretation of statutes or regulations. I especially urge agencies not to extend the Recommendation's provisions to agency heads.

The Recommendation focuses on "the *appearance* of adjudicator impartiality" to force "the recusal of adjudicators who may *appear* partial." Rec. at 1, 2 (emphases added).[2] It acknowledges that the resulting recusal rules will "tend to be much more open-ended and standard-like" than the extensive ethics rules already applicable to these and other officials and will be akin to rules "codified in judicial recusal statutes as well as model codes." *Id*. at 1, 3. Most troubling for my purposes, the Recommendation states that "[t]he recusal rules should also apply to adjudicators who conduct internal agency review of decisions from [initial] hearings" and that "agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads." *Id*. at 4, 6.

Appearance of impartiality standards, especially those modeled on judicial standards, tend and often seek to foster the public perception that agency adjudicators act independently of policy determinations or the directions of more senior officials. Those standards also tend to foster agency cultures and official actions consistent with those views. But that independence does not reflect reality, nor should it. These "adjudicators" are Executive Branch officials. They are not Article III or even Article I judges, and should not be treated as such. They should be and inevitably are "partial" in the sense of implementing and developing distinct Executive Branch policies through their decisions, and many of those policies are set forth prior to deciding individual cases. Ideally, those policy choices and associated legal interpretations would be expressly acknowledged and would reflect the views of senior officials, including the President.

[2] Citations to the recommendation in this Statement refer to page numbers of the original document that is posted at https://www.acus.gov/sites/default/files/documents/Recusal%20Rules%20Recommendation%20Post-Plenary%2012-21-2018%20Final.pdf.

This is especially so for officials reviewing initial hearing decisions and for agency heads, who must even more clearly execute the law through the exercise of discretion informed by distinct views of law and policy.

The Recommendation's conflation of these judicial and executive roles will likely undermine the formulation and implementation of Executive Branch legal policy. This is so because large segments of the public and many adjudicators themselves are prone to view the advocacy and implementation of distinct policies in the course of or prior to executing the law as reflecting inappropriate bias and lack of independence. That is, they view what should be the proper discharge of office as reflecting the "appearance of adjudicator impartiality." The resulting rules and the likely frequent resort to recusal motions will reinforce those views and impede the articulation of legal policy and the implementation of senior officials' judgments of how the law should be executed. Indeed, the Recommendation seeks to bar activities "such as advocating a particular policy in a speech before a professional association" and suggests that "the greater authority of the reviewer could warrant stronger appearance-based recusal standards." Rec. at 3 & 5. Especially as applied to officials who review initial adjudications and even more so for agency heads, this type of constraint is beyond unwarranted: it is undesirable as inconsistent with those officials' core responsibilities as Executive Branch officials and inconsistent with the powers vested in them and their superior officers.

The Recommendation also will tend to insulate administrative adjudicators further from the President, principal officers, other political appointees, and other officials who formulate policy and direct the execution of laws. That may be the intended effect. But that insulation does not only produce decisions that reflect uncoordinated policy choices and legal interpretations, masked as neutral decisionmaking. It also undermines the ultimate public accountability that the

separation of powers is designed to ensure. The adjudicators subject to the recommended rules will be at least "inferior Officers," and those reviewing or ultimately issuing the adjudicatory orders may well be principal officers. For both, the Appointments Clause is designed to "maintain clear lines of accountability—encouraging good appointments and giving the public someone to blame for poor ones," *Lucia v. SEC*, 585 U.S. __, slip op. 2 (2018) (Thomas, J., concurring), and those clear lines of accountability are also necessary to enable the President to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

The Recommendation and resulting rules also have the unintended effect of inserting the Conference and agencies into highly contested legal debates regarding the proper scope of Presidential appointment and removal powers. Like other limitations on or counterweights to those powers, the recommended rules will have the practical effect of submerging the role that discretionary policy and legal determinations play in adjudications, and of insulating agency adjudicators from the direct and indirect influence of officials accountable to the President. The Recommendation was adopted soon after the President expanded his control over appointing certain adjudicators, *see* EO 13843, *Excepting Administrative Law Judges from the Competitive Service* (July 10, 2018), and as the courts appear poised to address broader challenges to limits on the President's ability to direct agency decisionmaking, including adjudications, by appointing and removing officers. *See, e.g., Lucia v. SEC, supra*; *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010). The Conference and agencies should, if anything, seek instead to foster a more unified and coordinated exercise of Executive Branch action within our scheme of separated powers.

Administrative Conference Recommendation 2018-5

Public Availability of Adjudication Rules

Adopted December 13, 2018

[Note: The appendix referenced in this Recommendation has been omitted from this notice because of the inaccessible images it contains. The full appendix may be found online at www.acus.gov/sites/default/files/documents/Recommendation-2018-5_Appendix.pdf.]

Every year, federal agencies conduct hundreds of thousands of adjudications.[1] In order to participate meaningfully in adjudications, persons appearing before federal agencies must have ready online access both to the key materials associated with these adjudications (including prior decisions) and the procedural rules governing them. Administrative Conference Recommendation 2017-1 addresses the former set of materials, urging agencies to provide online access to the key documents associated with adjudications.[2] This Recommendation deals with the latter set of materials. It sets forth best practices to assist agencies in making their procedural rules available online and in organizing those materials in a way that is accessible to and comprehensible for the public and persons appearing before agencies, consistent with 5 U.S.C. §§ 552(a)(1), (a)(2), and other applicable provisions of law.[3]

A number of different sources create procedural rules that govern agency adjudications. At the very least, these sources include: (a) the Due Process Clause of the Constitution's Fifth Amendment; (b) the adjudication provisions of the Administrative Procedure Act (APA);[4] (c) agency or program-specific statutes that set forth rules for particular types of adjudications; (d)

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[1] *See* Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregate Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016).

[2] *See* Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

[3] Another ongoing Administrative Conference project addresses the online availability of agency guidance documents. Admin. Conf. of the U.S., *Public Availability of Agency Guidance*, https://www.acus.gov/research-projects/public-availability-agency-guidance. This recommendation deals only with the limited class of those documents relating to adjudication procedure.

[4] 5 U.S.C. §§ 554–58.

agency-promulgated rules of procedure with legal effect; (e) agency precedents as set forth in decisions by agency officials authorized to engage in final agency action;[5] (f) adjudicator-specific practice procedures applicable across multiple cases, such as standing orders; and (g) agency-specific forms that persons appearing before an agency are required to use.

In addition, many agencies have issued guidance documents and explanatory materials that help persons appearing before agencies navigate the adjudicative process and guide agency adjudicators and other agency officials.[6] These documents and materials usually take the form of policy statements and other forms of agency guidance, that, if not published, cannot be used to the disadvantage of persons appearing before the agency.[7]

Under existing law, agencies, with some limited exceptions, are required to publish rules of procedure with general applicability and legal effect in the *Federal Register* and to codify such rules in the *Code of Federal Regulations*,[8] and those rules in turn are required to be published on the agency websites.[9] Generally, agencies have some discretion over how to organize these materials on their websites.

A review of existing agency websites reveals that agency practices vary widely. Some provide access on their websites to all relevant statutes, rules of practice, precedents, standing orders, forms, and guidance documents and explanatory materials, whereas others publish few or

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[5] *Id.* § 704. Decisions of the Supreme Court may also be considered a binding source of law. Whether lower-court decisions are binding is not addressed here.

[6] To facilitate ease of understanding, an agency should tailor explanatory materials to meet the needs of the members of the public who typically appear before it. Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

[7] 5 U.S.C. §§ 552(a)(1)-(2); but *see id.* § 552(a)(1) (providing that an individual that has "actual and timely notice" of a requirement may be bound thereby even if the document was not published).

[8] 5 U.S.C. § 552(a)(1); 44 U.S.C. §§ 1505(a)(2), 1510(a); 1 C.F.R. §§ 5.2(c), 5.5, 5.9.

[9] *See, e.g.*, E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (amending 44 U.S.C. § 3501).

none of these things. Of those that do publish such documents and materials, some identify the sources of law from which the rules derive and clearly delineate between agency-promulgated rules of procedure with legal effect and (non-binding) guidance documents, whereas others do not. Finally, some websites are much more effective than others in organizing these materials and placing them in a logical location on the agency website such that they are easily accessible.

This Recommendation offers best practices to optimize agencies' online presentation of procedural rules for agency adjudications. Implementation of these best practices will benefit not only individuals appearing before agencies, who need ready access to procedural rules in order to proceed effectively, but also agencies, which, among other things, have an interest in ensuring that non-binding explanatory materials are clearly labeled as such. These best practices will also advance the purpose of the E-Government Act and recent amendments to the Freedom of Information Act, which expand affirmative disclosure by federal agencies and ensure that key agency documents are made available.[10]

Recommendation

The following recommendations offer best practices for agencies to consider as they seek to make procedural rules publicly available and to present those rules and related materials in a way that is accessible to and comprehensible for the public and persons appearing before agencies:

1. Agencies should provide updated access on their websites to all sources of procedural rules and related guidance documents and explanatory materials that apply to agency adjudications, including as relevant: (a) the provisions of the Administrative Procedure Act relating to adjudication (5 U.S.C. §§ 554–58); (b) statutory provisions providing

[10] E-Government Act of 2002, § 206, (amending 44 U.S.C. § 3501); FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538 (amending 5 U.S.C. § 552(a)(2)).

procedural rules for adjudication; (c) agency-promulgated rules of procedure with legal effect; (d) guidance documents and explanatory materials relating to adjudicative procedures, including guides designed for persons appearing before an agency and agency adjudicators (e.g., manuals, bench books), excepting those covered by a Freedom of Information Act exemption that the agency intends to invoke; and (e) agency-specific forms that individuals must use. Agencies should also consider, as appropriate, providing access to adjudicator-specific practice procedures applicable across multiple cases, such as standing orders.

2. In providing access to the materials pursuant to Paragraph 1, agencies should present the materials in a clear, logical, and comprehensive fashion. One way to do so is to display the materials published under Paragraph 1 in an easy-to-read table. An example appears in the Appendix located at www.acus.gov/sites/default/files/documents/Recommendation-2018-5_Appendix.pdf. When possible, agencies should prominently delineate between binding and nonbinding materials.
3. Agency-promulgated rules of procedure with legal effect should be accessible on agency websites in one easily searchable file. The rules should include a table of contents listing the rule titles. The rule titles should be hyperlinked to the rule text. The numbering system in the searchable file should mirror the *Code of Federal Regulations*' (CFR) numbering system and provide a link to the official version of the CFR.
4. When an agency's mission consists exclusively or almost exclusively of conducting adjudications, the agency should link to its materials published under Paragraph 1 on the agency's homepage. When conducting adjudications is merely one of an agency's many

functions, the agency should link to its rules and guidance from a location on the website that is both dedicated to adjudicatory materials and logical in terms of a person's likelihood of finding the documents in the selected location, such as an enforcement or adjudications page. Examples appear in the Appendix located at www.acus.gov/sites/default/files/documents/Recommendation-2018-5_Appendix.pdf.

5. Agencies should consider providing access on their websites to explanatory materials aimed at providing an overview of relevant agency precedents that apply the rules of procedure. Explanatory materials should link to applicable statutes, rules of procedure, and adjudicative precedents relating to adjudication procedures.

Administrative Conference Recommendation 2018-6

Improving Access to Regulations.gov's Rulemaking Dockets

Adopted December 13, 2018

As agencies develop regulations, they often seek input from the public. In order to submit an informed comment, a member of the public needs to be able to at least: (1) access the proposed rule and the agency's justification for it, and (2) access materials upon which the agency substantially relied to develop the proposed rule. Commenters should also be able to access other comments that may have been submitted on the proposed rule in time to submit responsive comments, to the extent this is possible.

Members of the public, especially those who are subject to the rule, should be able easily to determine whether further action has been taken on the proposed rule and, when a final rule has been issued, to access the rule and all materials, including public comments, that informed its development. This Recommendation seeks to make it easier for members of the public to access

these materials on Regulations.gov, thereby allowing them to contribute more effectively to the rulemaking process and understand their regulatory obligations.

Legal Requirements for Maintaining Electronic Rulemaking Dockets

The purposes of the E-Government Act of 2002 are to "improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency," and to "enhance public participation in Government by electronic means, consistent with [the Administrative Procedure Act]."[1] The E-Government Act of 2002 requires agencies, to the extent practicable, to maintain electronic rulemaking dockets (e-dockets).[2] An e-docket is simply a virtual folder that contains materials relevant to a particular rulemaking. It ideally includes any relevant notices (e.g., notices of proposed rulemaking (NPRMs)), supporting materials, and comments. Under the E-Government Act of 2002, e-dockets must make publicly available online, to the extent practicable, all comments received "and other materials that by agency rule or practice are included in the rulemaking docket . . . whether or not submitted electronically."[3]

The Administrative Conference has recommended that agencies manage their public rulemaking dockets to achieve "maximum public disclosure." This means that, to the extent feasible, agencies should include the following within their public rulemaking dockets: (1) notices pertaining to the rulemaking; (2) comments and other materials submitted to the agency related to the rulemaking; (3) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking; (4) reports or recommendations of any relevant advisory committees; (5)

[1] E-Government Act of 2002, Pub. L. No. 107-347, § 206(a), 116 Stat. 2899, 2915 (amending 44 U.S.C. § 3501).

[2] The E-Government Act of 2002 also requires agencies, to the extent practicable, to accept comments by electronic means. *Id.* § 206(c).

[3] *Id.* § 206(d)(2)(B).

other materials required by statute, executive order, or agency rule to be considered or made public in connection with the rulemaking; and (6) any other materials considered by the agency during the course of the rulemaking.[4] Because the E-Government Act of 2002 treats the e-docket as equivalent to the traditional rulemaking docket, agencies should include all these materials in their e-dockets.

Basic Structure of FDMS/Regulations.gov

Regulations.gov and the Federal Docket Management System (FDMS) are the primary vehicles through which all agencies, except for some independent regulatory agencies,[5] comply with the electronic commenting and e-docket requirements of the E-Government Act of 2002.[6] FDMS/Regulations.gov therefore houses a large part of the federal government's rulemaking and, for some agencies, non-rulemaking materials (e.g., adjudication dockets and Paperwork Reduction Act notices), spanning nearly 40 years from over 180 federal agencies.

Agencies create and manage e-dockets and their contents through FDMS.gov, a password-protected site that can be accessed only by authorized agency personnel. Agency officials are responsible not only for creating e-dockets but also for appropriately indexing them by selecting relevant Docket and Document Types and Subtypes, which will be described in greater detail below.

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[4] *See* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ¶ 1, 78 Fed. Reg. 41,358, 41,360 (July 10, 2013).

[5] The Federal Communications Commission and the Securities and Exchange Commission, for example, do not participate in FDMS/Regulations.gov. Instead, they maintain their own online rulemaking systems.

[6] Regulations.gov and FDMS were established by an initiative led by the Office of Management and Budget to implement President George W. Bush's Management Agenda. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM NO. M-02-08, REDUNDANT INFORMATION SYSTEMS RELATED TO ON-LINE RULEMAKING INITIATIVE (May 6, 2002).

FDMS maintains a data feed that is updated daily with contents of the *Federal Register*. Data received through this feed includes all rulemaking materials from participating and non-participating agencies that are published in the *Federal Register*.

The Regulatory Information Service Center (RISC) within the General Services Administration (GSA) also regularly interacts with FDMS/Regulations.gov. RISC maintains the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda), a semi-annual publication of significant regulatory actions that agencies plan to take in the short and long term. The Unified Agenda requires agencies to indicate, among other things, whether a rule has federalism implications, creates unfunded mandates, or affects small entities.[7] When an agency official enters a key identifier assigned by RISC, which is referred to as the Regulation Identifier Number (RIN) into the e-docket in FDMS, the Unified Agenda information publicly appears on Regulations.gov.

Governance and Funding of FDMS/Regulations.gov

FDMS/Regulations.gov is governed by an Executive Steering Committee (Committee) that consists of officials from dozens of federal agencies. The Committee is co-chaired by the Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA) and the Chief Information Officer of the Environmental Protection Agency (EPA). It makes decisions about the design, operations, maintenance, and budgeting of FDMS/Regulations.gov upon advice from several smaller, lower-tiered bodies.

EPA is considered the "managing partner" of FDMS/Regulations.gov. As such, it is responsible for implementing changes to the system that have been approved by the Committee. To carry out this responsibility, the EPA created a Project Management Office (PMO), which

[7] Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 Fed. Reg. 36,757 (June 26, 2015).

consists of a small staff of experts in online docket management technology. This staff implements the policy decisions of the Committee. Although some commenters use the term "eRulemaking Program" to refer to the PMO specifically, the term as used in this Recommendation refers not solely to the PMO, but also to the FDMS/Regulations.gov governance structure as a whole, including participating agencies.

There is no direct appropriated funding for FDMS/Regulations.gov.[8] Agencies that participate in FDMS/Regulations.gov fund the system through contributions, decided by a formula. The formula for contributions, established by the EPA in its Capital Asset Plan and Business Case, is based on a number of factors, including the average annual number of rules and non-rule items the agency publishes and the average annual number of comments posted on Regulations.gov.

[8] Cynthia R. Farina, Reporter, *Achieving the Potential: The Future of Federal E-Rulemaking, Report of the Committee on the Status and Future of Federal E-Rulemaking*, 62 ADMIN. L. REV. 279, 282 (2010).

Interaction Among FDMS/Regulations.gov, Other Online eRulemaking Systems, and Commercial Search Engines

In addition to the eRulemaking Program, there are federal offices that publish rulemaking materials and information. These include the Office of the Federal Register (OFR) and RISC. OIRA (within the Office of Management and Budget) and GSA publish the Unified Agenda on Reginfo.gov. The Unified Agenda indicates, among other pieces of information, whether a rule imposes unfunded mandates and whether it has federalism implications. OFR's Federalregister.gov provides access to the officially published *Federal Register*. Combined, information published by all three of these bodies and others provides the user with important context about rulemakings.

As used in this Recommendation, the term "data interoperability" means that rulemaking data published or housed by different entities is connected. Complete data interoperability in this context is achieved when a user is able to find all relevant information about a rule in one place. Currently, a basic level of data interoperability among FDMS/Regulations.gov, RISC, and OFR begins when agencies enter certain identifying numbers (key identifiers) pertaining to a rule into e-dockets. The three key identifiers are: (1) the Regulations.gov Document Number, (2) the RIN (described above), and (3) the Federal Register Document Number. The Regulations.gov Docket Number is generated by FDMS when an agency user creates an e-docket. The RIN is generated when an agency requests it from RISC. The Federal Register Document Number is assigned by OFR when an agency sends a document to it for publication in the *Federal Register*. Because e-dockets often contain more than one document that has been published in the *Federal Register*, there are often two or more Federal Register Document Numbers associated with any given rulemaking. When all three key identifiers are entered, users can understand the relationships

among related e-dockets and can have access to the entire lifecycle of a rulemaking. If any of these key identifiers are missing, or are incorrectly entered, users may have difficulty discerning important context about the rulemaking.

In addition to these other offices, FDMS/Regulations.gov interacts, to a limited extent, with commercial search engines. Currently, commercial search engines capture materials that have appeared on the "front page" of Regulations.gov (e.g., "What's Trending" notices). However, for technical reasons that are beyond the scope of this Recommendation, search engines currently do not capture the vast majority of materials on Regulations.gov.[9]

Third parties, including commercial search engines, may submit a request to the eRulemaking Program for an application programming interface (API) key. An API key allows a user to download all dockets and documents that appear on Regulations.gov. If a commercial search engine were to request and be granted an API key, it could therefore have access to all such dockets and documents. By working with commercial search engines to capture this data, the eRulemaking Program could harness the technological expertise of the private sector to make it easier for people to find rulemaking materials.

Problems with FDMS/Regulations.gov

Many users of Regulations.gov have found that the system does not allow them to consistently and reliably search for and find particular e-dockets and access supporting materials and other relevant information about rulemakings.[10]

One reason it is difficult to search for and find particular e-dockets is because agencies sometimes create multiple e-dockets for the same rulemaking.[11] For example, if an agency

[9] *See* Cary Coglianese, *A Truly "Top Task": Rulemaking and Its Accessibility on Agency Websites*, 44 ENVTL. L. REP. 10,660, 10,661–63 (2014).

[10] *See* Farina, *supra* note 8, at 285–86.

moves its rulemaking action from an NPRM to a final rule, the agency sometimes creates a separate e-docket for the final rule, instead of maintaining a single e-docket to which all documents related to the rulemaking are assigned. A user who tries to find this proposed rule might come across the first e-docket the agency created and conclude incorrectly that there was no final rule issued. Sometimes the "multiple e-docket" problem happens because a sub-agency (e.g., the Occupational Safety and Health Administration) issued the NPRM and created the initial e-docket, and the parent agency (e.g., the Department of Labor) issued the final rule and created the second e-docket. In any case, there are often at least two e-dockets, each containing documents that are part of a single rulemaking. At best, this is confusing. At worst, it misleads users as to the status of the rulemaking if their searches do not locate both e-dockets and enable them to recognize the relationship between them.

Another reason it is difficult to search for and find particular e-dockets is because the "Advanced Search" feature on Regulations.gov often does not helpfully narrow down the number of results that come up in a search. The purpose of an "advanced search" is to allow users to search by different filters (e.g., date range, type of source, and author), reduce the number of search results, and therefore increase the likelihood of finding what they are looking for. An advanced search function is especially important on Regulations.gov, given the millions of materials, many with similar titles, that are in the system.

However, many of the filters that appear within Regulations.gov's "Advanced Search" feature do not helpfully narrow down the relevant results. A user can search by Document Type, with the options listed as "Notice," "Proposed Rule," "Rule," "Public Submission," and "Other." These options do not capture the vast array of rulemaking materials, such as advanced and

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[11] *See* eRULEMAKING PROGRAM, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (Nov. 30, 2010).

supplemental notices of proposed rulemaking, that are on Regulations.gov. Agencies also use these labels inconsistently, which further hinders the public's ability to use the Document Type filter to successfully locate materials.[12] Some agencies, for example, label an advanced notice of proposed rulemaking as a "Notice," and others label it as a "Proposed Rule."[13] Additionally, there are Document Subtypes and Docket Subtypes, which offer a more comprehensive list of options that some agencies use and others do not. The existence of these Subtypes exacerbates the problem of inconsistent use and generates more confusion for the user of Regulations.gov who is trying to locate relevant results.

An additional problem with advanced searching is that selecting a parent agency as the "Agency" does not include results for sub-agencies. For example, a rule listed by a specific sub-agency (e.g., the Bureau of the Census) may not be available when one searches for rules issued by the parent agency (e.g., the Department of Commerce). Visitors who use the "Agency" filter and select a parent agency may erroneously conclude that a particular document has not been published.

When users do find relevant e-dockets, they may discover that the e-dockets do not always contain supporting materials and Unified Agenda information that are visible to the public.[14] Although agencies may have legitimate reasons for not posting some comments on Regulations.gov (e.g., concerns about confidential business information or copyrighted materials, a high volume of duplicate comments, or materials not subject to disclosure under the Freedom

[12] Because of inconsistent use of these labels, users cannot easily address broad questions about agency rulemaking practices, such as: how often agencies use pre-proposal public information gathering processes like notices of inquiry and advanced notices of proposed rulemaking, and how often agencies use direct final, interim final, and other final-before-comment processes.

[13] *See* Todd Rubin, Regulations.gov and the Federal Docket Management System 9 (Dec. 1, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/regulationsgov-and-fdms-final-report.

[14] *See* Farina, *supra* note 8, at 287.

of Information Act), there are good, practical reasons for agencies to include supporting materials within their e-dockets.[15] Doing so likely helps boost the quality of public comments, because the public can then better understand the agency's rationale and evidentiary support for the rule. Furthermore, if no Unified Agenda information appears within the e-docket, members of the public cannot easily determine, among other things, whether a rule is considered a "major rule," whether it has "federalism implications," and whether it affects small entities. The absence of this information may diminish the public's ability to comment adequately and therefore undermines the E-Government Act of 2002's goals of informed public participation and transparency in rulemaking.[16]

Yet another problem with FDMS/Regulations.gov is that it is not seamlessly interoperable with the other two main rulemaking sites: Reginfo.gov and Federalregister.gov. For example, if an agency user of FDMS neglects to enter the RIN for an e-docket, or enters an incorrect RIN, Unified Agenda information will not be displayed on Regulations.gov. A user of Federalregister.gov can search by whether a rule is "economically significant," but no such search option is available on Regulations.gov. Complete interoperability among these three sites would allow users to seamlessly locate essential context about rulemakings.

FDMS and Regulations.gov are remarkable achievements, made possible by the diligent work of many government officials over many years. However, FDMS and Regulations.gov can

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[15] *See* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

[16] *See* E-Government Act of 2002, Pub. L. No. 107-347, § 206(a), 116 Stat. 2899, 2915 (amending 44 U.S.C. § 3501) (stating that two of its purposes are to "improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency," and to "enhance public participation in Government by electronic means, consistent with [the Administrative Procedure Act].")

be improved to allow the public, agency officials, and members of Congress to find rulemaking materials easily and understand how rulemakings were developed.

Recommendation

1. The eRulemaking Program should work with the Office of the Chairman of the Administrative Conference on an ongoing basis to help identify and meet user needs in navigating and finding materials on Regulations.gov, both in its current form and as it continues to evolve.
2. The default requirement should be for agencies to use one e-docket for each rulemaking proceeding to the maximum extent possible. In instances in which agencies must use more than one e-docket for a single rulemaking, they should link the related e-dockets by using relevant identifiers and making clear to users in each of the related e-dockets that the e-dockets are linked. The eRulemaking Program should offer tools both on Regulations.gov, to help users identify instances of related e-dockets, and on the Federal Docket Management System, to help agency administrators, docket managers, and other agency officials implement the concept of one e-docket and highlight any related e-dockets.
3. The eRulemaking Program should work with the Office of the Federal Register, other federal officials, and other experts as needed to analyze the current list of Document and Docket Types and Subtypes and make any changes to these labels that will facilitate consistent use within and across agencies.
4. The eRulemaking Program, the Office of the Federal Register, the Regulatory Information Service Center, and offices that have statutory responsibilities related to rulemaking such as the National Institute of Standards and Technology, should work to

achieve data interoperability so that information in e-dockets can be connected to other relevant information, reflecting the entire lifecycle of a rulemaking proceeding.

5. The eRulemaking Program should ensure that agencies receive prompts that alert them to any e-dockets that do not have supporting and related materials. The prompt should remind agencies of their legal obligation to include, to the extent practicable, all materials that by agency rule or practice are included in the rulemaking docket, whether or not submitted electronically.
6. The eRulemaking Program should work with commercial search engines to make its publicly-available data as open, accessible, and searchable as possible.
7. Participating agencies should strive to ensure rulemaking comments are posted on Regulations.gov as soon as feasible.
8. Agencies should indicate in their e-dockets which, if any, types of comments were not posted and whether these comments can be accessed.

Separate Statement on Administrative Conference Recommendation 2018-6 by Various Members

Filed December 21, 2018 [The following statement is submitted by Government Member Chai R. Feldblum; Public Members Victoria F. Nourse, Anne Joseph O'Connell, Sidney A. Shapiro, and Kathryn A. Watts; and Senior Fellows Cynthia R. Farina, Ronald M. Levin, Jerry L. Mashaw, Nina A. Mendelson, Richard J. Pierce Jr., Richard L. Revesz, and Peter L. Strauss.]

The preamble to Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets* properly opens with the statement that

> As agencies develop regulations, they often seek input from the public. In order to submit an informed comment, a member of the public needs to be able to at least: (1) access the proposed rule and

> the agency's justification for it; and (2) access materials upon which the agency substantially relied to develop the proposed rule. Commenters should also be able to access other comments that may have been submitted on the proposed rule in time to submit responsive comments, to the extent this is possible.
>
> Members of the public, especially those who are subject to the rule, should be able easily to determine whether further action has been taken on the proposed rule and, when a final rule has been issued, to access the rule and all materials, including public comments, that informed its development. This Recommendation seeks to make it easier for members of the public to access these materials on Regulations.gov, thereby allowing them to contribute more effectively to the rulemaking process and understand their regulatory obligations.

As teachers of Administrative Law, we enthusiastically subscribe to these aims. The Recommendation does not promote them as fully as it could have, however, because it does not address the absence of comments and materials that may be submitted by other government agencies, including the Office of Information and Regulatory Affairs (OIRA), from the Regulations.gov docket. Some government discussions, of course, are pre-decisional policy discussions that the Freedom of Information Act (FOIA) permits government agencies to withhold from disclosure. But much of the material provided rulemaking agencies in other agencies' comments constitutes both data and other matters that would have to be disclosed in response to a FOIA request, and "materials upon which the agency substantially relied to develop the proposed rule." Moreover, Executive Order 12,866 and its amendments promise the publication of certain OIRA communications, to an extent that might not be required under FOIA but nonetheless could contribute to the important ends this Recommendation supports. Academic research has shown, again and again, that these promises are not being fulfilled; Regulations.gov is essentially devoid of the governmental agency contributions to rulemaking we are certain have been ongoing, and knowledge of which would allow members of the public

"to contribute more effectively to the rulemaking process and understand their regulatory obligations."

In the Assembly's discussion of this Recommendation, this important gap was discussed, and the suggestion made that the Recommendation should invite the inclusion of government contributions to Regulations.gov, at least to the extent that those contributions would be subject to disclosure in response to a proper FOIA request. The Assembly failed to act on this suggestion after an objection that the issue had not been explored at earlier stages of the Conference's process. Whatever the merit of that procedural objection, the omission is regrettable. We hope that agencies will include these government contributions in their rulemaking dockets, so that Regulations.gov may better enable the public to "access materials upon which the agency substantially relied to develop the proposed rule . . . [and] other comments that may have been submitted on the proposed rule in time to submit responsive comments, to the extent this is possible."

The members who have joined in this statement are mindful that the issue of disclosure of intra-government communications arises in multiple contexts. Another such context is the set of additional disclosure principles prescribed in Executive Order 12,866. This order requires federal agencies and OIRA, following publication or issuance of a regulatory action subject to the order, to publish what has been submitted to OIRA, to identify any substantive changes between the draft submitted to OIRA and the published rule, and to identify those changes made at OIRA's suggestion or recommendation. Any such disclosures would be a natural, and welcome, element of Regulations.gov. These broader issues also remain available as topics that the Conference may wish to take up in the future.

Administrative Conference Recommendation 2018-7

Public Engagement in Rulemaking

Adopted December 14, 2018

Robust public participation is vital to the rulemaking process. By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules.[1] Agencies, however, often face challenges in involving a variety of affected interests and interested persons in the rulemaking process.

The Administrative Procedure Act (APA) recognizes the value of public participation in rulemaking by requiring agencies to publish a notice of a proposed rulemaking (NPRM) in the *Federal Register* and provide interested persons an opportunity to comment on rulemaking proposals.[2] Other statutes, including the Federal Advisory Committee Act (FACA)[3] and Negotiated Rulemaking Act,[4] describe other means to engage representatives of identified interests in the rulemaking process. In many rulemakings, however, agencies rely primarily on notice-and-comment procedures to solicit public input. Although the notice-and-comment process generates important information, agencies can sometimes benefit from engaging the public at other points in the process and through other methods, particularly as they identify regulatory issues and develop potential options before issuing NPRMs.

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[1] Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 9–17 (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/public-engagement-rulemaking-final-report.

[2] 5 U.S.C. § 553(b)–(c).

[3] Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2).

[4] Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561–70).

The Conference has previously adopted several recommendations directed at expanding participation in the rulemaking process. These previous recommendations address a variety of issues, including rulemaking petitions, advisory committees, negotiated rulemaking, social media, comment and reply periods, and plain language in regulatory drafting.[5] This Recommendation builds on these past recommendations and focuses on supplemental tools agencies can use to expand their public engagement.

For the purposes of this Recommendation, "public engagement" refers to activities by the agency to elicit input from the public. It includes efforts to enhance public understanding of agency rulemaking and foster meaningful participation in the rulemaking process by members of the public. Because some affected interests and other interested persons may not be aware of agency rulemakings or understand how to participate, effective public engagement may require agencies to undertake deliberate outreach and public education efforts to overcome barriers to participation, including geographical, language, resource, and other constraints.[6]

Strategic planning focused on public engagement can help agencies solicit and obtain valuable information from a greater number of affected interests with diverse experiences, information, and views throughout the rulemaking process, including experts, individuals, or entities with knowledge germane to the proposed rule who do not typically participate in the

[5] *See* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

[6] *See, e.g.*, Cary Coglianese, Federal Agency Use of Electronic Media in the Rulemaking Process 46–48 (Dec. 5, 2011) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-agency-innovations-report (discussing the "digital divide" and differing Internet usage among a variety of demographics).

notice-and-comment process.[7] An agency should begin by developing a general policy for public engagement that identifies factors or establishes standards for the agency to use to design engagement efforts in individual rulemakings. The agency can then apply or tailor its general policy to specific rule proposals, reflecting the unique purposes, goals, and needs of each rulemaking. Well-designed planning for specific rulemakings will include consideration of a variety of methods to obtain valuable information from diverse sources at various stages during the rulemaking process.[8]

Not all rulemakings, however, warrant enhanced public engagement. Some rules hold little public salience or address narrow issues, so public engagement beyond the notice-and-comment process is unlikely to provide the agency with additional relevant information. On the other hand, some rules are complex, affect a wide range of interests in a variety of ways, or implicate controversial issues. For these rules, additional, well-designed public engagement may be worthwhile to obtain information from affected interests and other interested persons who might not otherwise participate in the rulemaking and encourage more useful participation from those who do. Agencies considering enhanced public engagement for a particular rule must carefully evaluate many factors, including agency resources, rule complexity, and the prevalence of otherwise missing information or views, before deciding whether to pursue additional outreach. Furthermore, even after agencies decide to undertake enhanced public engagement when developing their rules, they must decide what methods are best suited to accomplish their

[7] For a discussion of general public engagement policies, see Sant'Ambrogio & Staszewski, *supra* note 1, at 138–43. For examples of general public engagement policies, see U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., DIRECTOR'S ORDER #75A: CIVIC ENGAGEMENT AND PUBLIC INVOLVEMENT POLICY (Aug. 30, 2007); ENVTL. PROT. AGENCY, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003).

[8] For a discussion of specific public engagement plans for individual rulemaking initiatives, see Sant'Ambrogio & Staszewski, *supra* note 1, at 143–49.

outreach goals. Each method may offer distinct benefits but come with varying costs or other limitations. Agencies should consider how a specific method of public engagement will assist them in obtaining the type of information and feedback they seek. Agencies should also consider the best timing for using a method of public engagement. Finally, with whatever public engagement method an agency chooses, it should demonstrate a sincere desire to learn from those who participate and should display open-mindedness about the relevant issues presented by the rulemaking.

This Recommendation highlights three main methods for supplementing the notice-and-comment process. First, agencies can publish "requests for information" (RFIs) or "advance notices of proposed rulemaking" (ANPRMs) in the *Federal Register* to request data, comments, or other information on regulatory issues before proceeding with a specific regulatory proposal.[9] Although these two mechanisms are similar, RFIs are generally used when an agency is determining whether to proceed at all and, if so, what general approach to take.[10] ANPRMs are generally used when the agency has formulated one or more tentative regulatory options and seeks input on which option to propose.[11] RFIs and ANPRMs may be particularly beneficial when agencies seek additional information to identify areas of concern, compare potential approaches to problems, and evaluate and refine regulatory proposals. RFIs and ANPRMs provide agencies with additional opportunities to solicit information without organizing potentially costly or burdensome face-to-face engagement efforts.

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[9] Some agencies refer to documents similar to RFIs and ANPRMs under other names, including "notice of inquiry."

[10] For a discussion of the use of RFIs during agenda setting and rule development, see *id.* at 50–52, 65 (discussing the use of RFIs by the Department of Energy, the Bureau of Consumer Financial Protection, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation).

[11] For a discussion of the use of ANPRMs, see *id.* at 78–80. For example, the Department of Energy routinely issues ANPRMs to solicit public comments on preliminary proposals pursuant to its process rule. *See id.* at 141–43.

Second, agencies may engage in targeted outreach to identify and engage affected interests that might not otherwise participate in the rulemaking.[12] RFIs and ANPRMs are useful tools to enhance participation early in the rulemaking process. However, RFIs and ANPRMs published in the *Federal Register* may only reach affected interests that are already likely to participate in the rulemaking. Targeted outreach efforts allow agencies to seek information from individuals and entities that may not read the *Federal Register* or otherwise would be unaware of or unable to participate effectively in the notice-and-comment process. To engage in targeted outreach, an agency identifies affected interests that are not likely to participate and undertakes efforts to notify those interests of the rulemaking and encourage and facilitate their participation. Targeted outreach can take on a variety of forms, and agencies tailor these efforts to specific affected interests and rules.

Third, agencies may also convene meetings of affected interests and other interested persons to obtain useful feedback on potential regulatory alternatives and elicit information through a process of interactive dialogue. Meetings can educate participants and allow them to consider and respond to differing views, thereby informing decision-makers in the process. When all goes well, meetings can foster the generation of new ideas and creative solutions that would be missed when participants simply assert their existing positions. Meetings also can lead to some change in participants' positions in light of a greater understanding of others' concerns.

Agencies must carefully plan meetings to help ensure that they will elicit the type of information sought.[13] An agency can structure a meeting to generate open-ended dialogue,

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[12] For example, the Forest Service conducted targeted outreach, including forums, roundtables, and consultation meetings, seeking the input of recreational users of forests, Native American tribal communities, and state and local government officials when developing its 2012 Planning Rule. *See id.* at 53.

[13] For a discussion of focus groups and listening sessions, see *id.* at 48–54 (discussing the use of focus groups by the National Highway Traffic Safety Administration to address public fears about airbags and potential labels on tire

allowing participants the opportunity to raise their own concerns or issues.[14] Alternatively, an agency can structure a meeting so that the agency's priorities dictate the agenda or discussion topics. Although meetings, whether designated as workshops, hearings, or listening sessions, can vary in their format, they can be structured so that the requirements of FACA or the Paperwork Reduction Act (PRA) are not applicable.[15]

Agencies should make information available to the public about individual rulemakings and opportunities to participate. The availability of this information will help ensure that members of the public are adequately informed and can participate meaningfully in response to RFIs, ANPRMs, meeting opportunities, and other forms of public engagement.[16] For example, an agency may list such information on a dedicated webpage or a section of a page on an agency's website. Doing so could help that agency inform and engage affected interests and other interested persons throughout the rulemaking process.[17]

Recommendation

Public Engagement Planning

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fuel efficiency), 65–68 (discussing use of facilitated listening sessions by the Nuclear Regulatory Commission), 80–82 (discussing public meetings in general and EPA's use of "shuttle diplomacy" and technical workshops).

[14] For a discussion of different techniques to facilitate enhanced deliberation, see *id.* at 128–138.

[15] These methods would not implicate FACA as long as they are structured so the group is not collaborating to offer a set of proposals to the agency. *See, e.g.*, Judicial Watch, Inc. v. Clinton, 76 F.3d 1232, 1233 (D.C. Cir. 1996). These methods also would not implicate the PRA so long as the agency is not circulating a structured set of inquiries. 44 U.S.C. § 3502(3) (2012).

[16] For example, the Bureau of Consumer Financial Protection posted prototypes of disclosure forms on its website and sought targeted feedback when it developed rules governing disclosure requirements for home mortgages. *See* Sant'Ambrogio & Staszewski, *supra* note 1, at 83–84.

[17] *See generally* Recommendation 2011-8, *supra* note 5.

1. Agencies should develop and make publicly available general policies for public engagement in their rulemakings. An agency's general policy should address how the agency will consider factors, such as:
    a. the agency's goals and purposes in engaging the public;
    b. the types of individuals or organizations with whom the agency seeks to engage, including experts and any affected interests that may be absent from or insufficiently represented in the notice-and-comment rulemaking process;
    c. how such types of individuals or organizations can be motivated to participate;
    d. what types of information the agency seeks from its public engagement;
    e. how this information is likely to be obtained;
    f. what the agency will do with the information;
    g. when public engagement should occur; and
    h. the range of methods of public engagement available to the agency.
2. An agency's general policy for public engagement should be used to inform public engagement with respect to specific rulemakings. Planning for public engagement for specific rules would best take place at the earliest feasible part of the rulemaking process.
3. In determining whether and how to enhance or target public engagement prior to the publication of a specific proposed rule, agencies should consider factors such as:
    a. the complexity of the rule;
    b. the potential magnitude and distribution of the costs and benefits of the rule;
    c. the interests that are likely to be affected and the extent to which they are likely to be affected;

d. the information needed and the potential value of experience or expertise from outside the agency;

e. whether specific forms of enhanced or targeted public engagement are likely to provide useful information, including from experts, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, or other individuals with relevant views that may not otherwise be expressed;

f. any challenges involved in obtaining informed participation from affected interests or other interested persons likely to have useful information, including the challenge of providing rulemaking materials in a language and form comprehensible to nonexperts whose participation is being sought;

g. whether the rule is likely to be controversial;

h. the time and resources available for enhanced or targeted public engagement as opposed to other uses; and

i. whether additional legal requirements, such as the Federal Advisory Committee Act or the Paperwork Reduction Act, might apply.

4. Agencies should consider using personnel with public engagement training and experience to participate in both the development of their general public engagement policies as well as in planning for specific rules. Agencies should support or provide opportunities to train employees to understand and apply recognized best practices in public engagement.

Timing and Methods of Public Engagement

5. Public engagement should generally occur as early as feasible in the rulemaking process, including when identifying problems and setting regulatory priorities.

6. *Requests for Information and Advance Notices of Proposed Rulemaking.*

    a. Agencies should consider using requests for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) when they need to:

        i. gather information or data about the existence, magnitude, and nature of a regulatory problem;

        ii. evaluate potential strategies to address a regulatory issue;

        iii. choose between more than one regulatory alternative; or

        iv. develop and refine a proposed rule.

    b. When using RFIs and ANPRMs, agencies should:

        i. sufficiently convey their receptivity to input;

        ii. pose detailed questions aimed at soliciting the information they need; and

        iii. indicate that they are open to input on other questions and concerns.

    c. Agencies should review any comments they receive in response to RFIs and ANPRMs and, when issuing any proposed rule that follows an RFI or ANPRM, explain how these comments informed or influenced the development of the subsequent proposal.

7. *Targeted Outreach.* When agencies believe that their public engagement may not reach all affected interests, they should consider conducting outreach that targets experts not already likely to be involved, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, and members of the public with relevant

views that may not otherwise be represented. These targeted outreach efforts should include:

a. proactively bringing the rulemaking to the attention of affected interests that do not normally monitor the agency's activities;

b. overcoming or minimizing possible geographical, language, resource, or other barriers to participation;

c. motivating participation by explaining the nature of the rulemaking process and how the agency will use public input; or

d. providing information about the issues and questions raised by the rulemaking in an accessible and comprehensible form and manner, so that potential participants are able to provide focused, relevant, and useful input.

8. *Meetings with Affected Interests and Other Interested Persons.*

a. Agencies should consider convening meetings of affected interests and other interested persons to obtain feedback on their priorities and potential regulatory alternatives, particularly when they are unlikely to obtain the same information from written responses to RFIs, ANPRMs, or notices of proposed rulemaking (NPRMs). When conducting a meeting, the agency should:

i. determine whether to target and invite specific participants or open the meeting to any interested member of the general public;

ii. determine whether to conduct the meeting in person, online, or both;

iii. recruit participants based on the nature of the rule at issue and the type of feedback that the agency seeks;

iv. consider using a trained facilitator or moderator from inside or outside the agency, as appropriate;

v. provide background materials for the participants that clearly explain relevant issues and the primary policy alternatives in language and form comprehensible to all types of participants the agency seeks to engage;

vi. disseminate questions to participants in advance, including either open-ended questions or questions aimed at soliciting specific information the agency needs to make informed decisions;

vii. determine whether and how to structure interactive dialogue among participants;

viii. consider recording the session and making that recording publicly available; and

ix. prepare a summary of the meeting.

b. Agency representatives should convey their receptivity to input during meetings with affected interests and other interested persons.

c. The agency should consider structuring its meetings in a manner to promote enhanced input from affected interests and other interested persons.

Public Availability of Rulemaking Information

9. To support public engagement prior to the publication of the NPRM, agencies should consider affirmative steps to make publicly available relevant information about the rulemaking, such as by creating a dedicated webpage. Agencies should seek to make rulemaking information comprehensible for individuals and groups that do not typically

participate in the rulemaking process, such as by using audiovisual materials or other media to supplement more traditional written information in appropriate situations. Information to make available could include:

a. the status of the rulemaking initiative and opportunities to participate in the process;

b. an explanation of the rulemaking process, the role of public participation, and the qualities of a useful comment;

c. an identification of the issues under consideration and related information, presented in forms that are readable and comprehensible by non-experts; and

d. summaries of public engagement efforts, including any information received from the public or a description of the impact of those efforts.

Administrative Conference Recommendation 2018-8

Public-Private Partnerships

Adopted December 14, 2018

Federal agencies often participate in public-private partnerships (partnerships) to assist in carrying out their missions.[1] A private-sector entity and the federal government may have a variety of reasons for wanting to partner with one another. Both sectors may find, for instance,

[1] This Recommendation focuses on partnerships that relate to social welfare topics, such as health, labor, education, and diplomacy. The Recommendation focuses on these kinds of partnerships, as opposed to, for example, infrastructure partnerships, research and development (R&D) partnerships, and activities under the National Technology Transfer and Advancement Act, because social welfare topics are areas of expertise for agencies involved in an interagency working group convened by the Office of the Chairman of the Administrative Conference to develop the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level* (described below). Readers who are interested in infrastructure partnerships should also consult, among other sources, U.S. Dep't. of Treas., *Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests* (Apr. 2015). Those interested in R&D partnerships should also consult, among other sources, ALBERT N. LINK, PUBLIC/PRIVATE PARTNERSHIPS: INNOVATION STRATEGIES AND POLICY ALTERNATIVES 7–22 (Springer 2006).

that a partnership with the other allows them to access more resources and expertise. Expanded access to such resources and expertise may allow them to complement and reinforce their missions, producing outcomes with greater impact than they could achieve working entirely independently of one another.[2] Recent government-wide initiatives relating to, among other areas, workforce training[3] and government effectiveness,[4] are centered on partnerships.

There is no binding definition of "public-private partnerships" that spans across all agencies, but an interagency working group has defined them as "collaborative working relationships between the U.S. government and non-federal actors in which the goals, structures, and roles and responsibilities of each partner, are mutually determined."[5]

There is no bright line distinction between partnerships and other forms of collaboration between federal agencies and the private sector, but there are certain characteristics that are indicative of a partnership. With partnerships, there is continuous, ongoing assessment and decision making with respect to the goals and structures of the arrangement, the roles and responsibilities of each partner, and the risks that each partner assumes. Because of the continuous nature of this decision making, there is often a strong alignment of resources: that is, both parties to the partnership generally spend their own materials, time, and money throughout the course of the partnership, without reimbursement from the other partner.

In other forms of collaboration between agencies and the private sector (e.g., procurement contracts), these aspects of the relationship are typically determined at a single

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[2] *See* CMTY. P'SHIPS INTERAGENCY POLICY COMM., BUILDING PARTNERSHIPS: A BEST PRACTICES GUIDE 2 (2013).

[3] *See* Exec. Order No. 13,845, 83 Fed. Reg. 35,099 (July 24, 2018).

[4] *See* OFFICE OF MGMT. & BUDGET & GEN. SERVS. ADMIN., THE GEAR CENTER, https://www.performance.gov/GEARcenter.

[5] *See* CMTY. P'SHIPS INTERAGENCY POLICY COMM., *supra* note 2, at 1 n.1.

point in time and memorialized through a legally binding instrument such as a contract. Although it is possible for a partnership to be formalized through a contract, partnerships are far more often formalized through non-binding memoranda of understanding (MOUs) or memoranda of agreement (MOAs). These instruments are often quite concrete and specific with respect to the goals of the partnership, but broad and flexible with respect to the roles and responsibilities of the partners and the governance of the partnership. They are therefore better suited than contracts for formalizing partnerships.

This Recommendation does not attempt to adopt a definitive definition of partnerships, but the foregoing characteristics should help agencies identify the types of relationships that fall under the partnership umbrella. Ultimately, it is up to agencies to determine what relationships qualify as partnerships and under what circumstances they should draw upon the recommendations below.[6]

Development of the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level*

In the spring of 2017, at the suggestion of the Committee on Regulation, the Conference's Office of the Chairman convened dozens of federal officials from 19 different agencies who actively work on partnerships. Throughout the course of three meetings from July 2017 through February 2018, and various discussions with individual group members, the group

[6] For examples of relationships that some agencies consider to be partnerships, see Occupational Safety & Health Admin., U.S. Dep't of Labor, *Partnership: An OSHA Cooperative Program*, https://www.osha.gov/dcsp/partnerships/index.html; U.S. Dep't of Justice, *Partnership for Freedom*, https://ovc.ncjrs.gov/humantrafficking/announcements.html (recently ended); and U.S. Dep't of State, *Diplomacy Lab*, https://www.state.gov/s/partnerships/ppp/diplab.

collaboratively drafted the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level* (*Guide*).[7]

The *Guide* addresses major legal issues that agencies will likely encounter as they participate in partnerships. The *Guide* also offers a definition of "public-private partnerships," briefly discusses a previous interagency effort regarding partnerships, highlights activities that agencies often undertake as part of partnerships, and provides examples of specific partnerships. Finally, the *Guide* discusses issues pertaining to agencies' vetting of potential private partners.

Potential Inefficiencies in Vetting Private Entities

Officials across agencies can benefit from sharing experiences with one another regarding partnerships. One issue that has emerged as a particularly good candidate for such interagency discussion is how agencies vet potential private-sector partners. Agencies vet potential private partners to avoid possible conflicts of interest or harm to the agency's reputation. Vetting can be a time intensive and potentially duplicative enterprise, both for the agencies and for potential private partners that are asked to submit information to agencies.[8]

Agencies have differing practices with respect to vetting of potential private-sector partners. Some agencies have central vetting units with officers whose exclusive responsibility is to vet proposed private-sector partners and an official whose responsibility is to approve partnerships for the entire agency. Other agencies lack a central vetting unit and, instead,

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[7] *See* Public-Private Partnerships Working Group, Admin. Conf. of the U.S., Office of the Chairman, Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level (Dec. 2018), https://www.acus.gov/report/guide-legal-issues-involved-public-private-partnerships-federal-level-final-12-6-2018.

[8] *See* INTERACTION, PARTNER VETTING INDEPENDENT ASSESSMENT: INSUFFICIENT JUSTIFICATION FOR A GLOBAL ROLLOUT 17 (2016), *available at* https://www.interaction.org/document/partner-vetting-independent-assessment-insufficient-justification-global-rollout.

authorize each of their offices to conduct its own vetting. Some of the latter agencies produce resources that all staff are directed to use.

Duplication of vetting happens across agencies ("external duplication") when two or more agencies gather the same information about the same potential private partner. Duplication also happens within agencies ("internal duplication") when two or more parts of a single agency gather the same information about the same potential private partner. Some agencies have developed or are developing practices to avoid internal duplication. There do not appear to have been robust efforts to avoid external duplication.

Agencies with a centralized vetting unit are better able to avoid internal duplication by maintaining copies of their vetting reports and updating those reports rather than starting anew when there is another request to partner with that same entity. Some agencies that do not have centralized vetting units maintain central databases that allow all employees to manage partnerships and upload relevant documents, including vetting results. Other employees, as they begin exploring potential partnerships, can access these databases and search them for past or current partnerships and supporting documentation before vetting a potential partner, thereby reducing or eliminating duplicative vetting.

Agency Officials Exchanging Best Practices Regarding Partnerships

An online forum could be structured to allow agency officials to exchange best practices on any number of topics involving partnerships, such as how to:

- Initiate or create a partnership in a manner that is consistent with ethical requirements,
- Evaluate the success of partnerships,
- Structure an internal vetting process (for example, whether there should be a central vetting unit, or whether vetting should be carried out office by office),

- Develop internal processes to reduce duplication in vetting, and
- Resolve complex legal issues encountered during the lifecycle of partnerships.

The forum could also allow agency officials to exchange resources with one another, including sample MOUs and MOAs, and checklists or worksheets that agencies use when vetting potential private-sector partners or structuring partnerships.

Additionally, while taking into consideration relevant laws and protections regarding privacy, ethics, and other restrictions on disclosure of personally identifiable information, agencies can consider sharing notes about specific private-sector entities that have been vetted. These notes may help reduce external duplication by allowing agencies to see the results of other agencies' vetting of specific entities.

MAX.gov, a website established by the Office of Management and Budget in 2007, can offer such a forum. The website can be accessed only by those with a federal government email address. An agency could set up an interagency partnership group on MAX.gov that would allow agency officials to exchange best practices with respect to partnerships and share resources.

Recommendation

1. All agencies that are considering, or are currently participating in, a public-private partnership (partnership) should distribute the *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level* (*Guide*) (available at https://www.acus.gov/report/guide-legal-issues-involved-public-private-partnerships-federal-level-final-12-6-2018) to attorneys in their general counsels' offices, or other central legal offices, and should distribute it to partnership staff throughout the agency.
2. The Office of the Chairman of the Administrative Conference should create a group on MAX.gov titled "Strategies for Developing and Managing Successful Partnerships." The

group should be structured to allow agency officials to exchange best practices with one another regarding partnerships. It should also allow agency officials to share resources, including sample memoranda of understanding or agreement, and checklists or worksheets that agency officials use when vetting potential private-sector partners.

3. All agencies that are considering, or are currently participating in, a partnership should encourage staff responsible for partnership efforts to join the MAX.gov group and actively participate in the discussion topics and uploading of resources. Participation should be consistent with protections regarding privacy, ethics, and other restrictions on disclosure of personally identifiable information and should be undertaken in consultation with the agency's general counsel's office or other designated legal office.

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